No. 47641-0-II

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

OLYMPIC STEWARDSHIP FOUNDATION, et al.,

Petitioners,

v.

GROWTH MANAGEMENT HEARINGS BOARD, et al.

Respondents.

On Direct Appeal from the Growth Management Hearings Board

AMICUS BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Brian T. Hodges (WSBA No. 31976)
Ethan W. Blevins (WSBA No. 48219)
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565

Attorneys for Amicus Curiae Pacific Legal Foundation

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INTRODUCTION

This Shoreline Management Act (SMA) case raises an important question of property law that will affect shoreline landowners throughout the State. Specifically, it asks whether the Department of Ecology's reliance on the phrase, "no net loss of shoreline ecological function," in its regulatory guidelines alters the Legislature's statement that "[i]t is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses." RCW 90.58.020. It does not and cannot. *See Fahn v. Cowlitz County*, 93 Wn.2d 368, 383, 610 P.2d 857 (1980) (an agency lacks the authority to amend or change a legislative enactment). Instead, just like the express policy of the SMA, "no net loss" embraces a policy of compromise between environmental and development interests. While the SMA emphasizes protection of natural shorelines, it simultaneously allows for development, expressing the intent to protect private property rights and to foster all reasonable and appropriate uses of the shorelines. *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 726, 696 P.2d 1222 (1985). If properly applied, the SMA's policy of balance makes it possible to protect the environment in a manner that does not violate a landowner's constitutionally protected rights. *Nollan v. California Coastal*

Commission, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994). The Growth Management Hearings Board erred when it interpreted "no net loss" as establishing a policy that private property rights are "secondary" to the State's "primary" goal of protecting the environment. *Hood Canal Sand & Gravel LLC, et al. v. Jefferson County and Washington State Department of Ecology*, No. 14-2-0008c, at 31-33, 80 (Final Decision and Order, Nov. 16, 2015) (Decision). For the reasons discussed below, the Board's decision should be reversed.

ISSUES ADDRESSED BY AMICUS BRIEF

1. Whether Washington's Legislature, in enacting the SMA, adopted a policy that private property rights must yield to the goal of protecting the environment where the Act specifically directs local governments to protect property rights and allows shoreline development.

2. Whether the Growth Board's interpretation of the "no net loss" standard conflicts with the SMA's policy of encouraging appropriate development where the Board concluded that "no net loss" required Jefferson County to impose restrictions on property without first requiring that the County demonstrate the necessity and effectiveness of the new restrictions.

3. Whether the Board's interpretation of the "no net loss" standard violates *Nollan* and *Dolan*, where the Board relied on that standard to uphold a requirement that property owners dedicate a uniform, 150-foot buffer as a mandatory condition on all new shoreline development without first requiring that the County demonstrate that the buffers are necessary to mitigate an impact caused by the proposed development.

THE "NO NET LOSS" STANDARD ADVANCES THE SMA POLICY OF ENCOURAGING APPROPRIATE DEVELOPMENT ON THE SHORELINE

A. The Legislature Enacted the SMA as a Compromise Between Environmental and Private Property Interests

The SMA, passed by the Legislature in 1971 and adopted by public referendum the following year, represents a compromise between the interests of government, environmentalists, business interests, and property owners.[1] Several occurrences led to the enactment of the SMA, chief among which were the growth of popular environmentalism in the 1960s, a series of high-profile court decisions concerning the need for rules pertaining to the

[1] *See* R.L. Bish, *Governing Puget Sound* (Puget Sound Books 1982).

development of waterfront property, and years of legislative inaction.[2] In the wake of a legislative setback in 1970, the Washington Environmental Council (WEC) drafted and submitted its "Shoreline Protection Act"—a stringent "environmental proposal"—known as Initiative Measure 43—to the Legislature.[3] The Legislature took no action on the Shoreline Protection Act. Instead, in 1971, it drafted and enacted the SMA (also referred to as "Measure 43B") as a substitute law, then referred both Measures for referendum in the general election in 1972. Both Measures agreed that the law did not adequately address the use and development of the shorelines, and agreed that it was in the State's interest to provide better planning and coordination. However, the competing Measures diverged on how to accomplish that general goal. Measure 43B (the SMA) stated its purpose as "planning and fostering all reasonable and appropriate uses and to enhance the public interest," and specifically set forth a variety of uses, including single-family homes, to be given preference under the law.[4] Whereas,

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[2] Geoffrey Crooks, *The Washington Shoreline Management Act of 1971*, 49 Wash. L. Rev. 423, 423-24 (1974)

[3] *Id.* at 424.

[4] James C. Barron, *Shoreline Management – What are the Choices?* Wash. State Univ., Ext. Mimeograph 3524, pp. 2-3 (Dec. 1971).

Measure 43 (the WEC proposal) set multiple environmental goals, expressly prioritizing environmental protection over private property rights. Barron, *supra*, at 4. Indeed, the WEC proposal would have created a "public[] right to an unpolluted and tranquil environment." *Id.* at 7. Thus, the SMA was presented as a law that would strike a balance between property and the environment by recognizing the importance of protecting the shoreline environment, while encouraging appropriate development. *See Futurewise v. W. Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 242, 244, 189 P.3d 161 (2008) (The goal of the SMA is "balancing use and protection.").

Of particular significance to the issues in this case, Measure 43B (the SMA) recognized that shoreline regulation may not violate property rights and stated a goal of "fostering" appropriate development and uses of the shorelines, "specifically prohibiting few if any uses . . . ." Crooks, *supra*, at 457. To drive that point home, the Legislature amended its proposed measure to withdraw from Ecology and local governments the right to use eminent domain, stating in the voters' pamphlet, "[t]here is no local or state takeover of private land." *Id.* at 452 nn.170-71, 457. Indeed, the Voter Pamphlet for Measure 43B (the SMA) states:

> **The Act Doesn't Prohibit Development.** The goals of the Act are to coordinate land development, to encourage

development which is compatible with shoreline resources, and to discourage development which is not.

Private Property Rights and Increased Recreational Opportunities. Your property remains your own and private. There is no local or state take-over of private land.

Official Voters Pamphlet, Alternative Measure 43B, p. 34 (Nov. 7, 1972).

Thus, commentators viewed the SMA's recognition of the need to protect private property rights as unlikely to generate claims of regulatory taking because "private property . . . [would] seldom be subjected to restrictions which severely diminish economic value." Crooks, *supra*, at 456. The commentators also pointed out that *publicly* owned lands are "particularly adapted to some uses" (for example, wilderness or conservation areas), which "would tend to destroy the economic value of privately owned shorelines." *Id.* This last point is particularly applicable to Jefferson County because much of its land base (approximately 77 percent) is comprised of Olympic National Park or United States Forest Service land. *See* Jefferson County Comprehensive Land Use Plan, p. 3-1.

When presented with a choice between a stringent "environmental proposal" and a law "balancing use and protection," the people soundly rejected WEC's proposal, opting for the compromise contained in the SMA by a significant margin (611,748 to 285,721). Crooks, *supra*, at 424-25.

B. Ecology Adopts a "No Net Loss" Standard in Its Guidelines

As adopted, the SMA establishes a cooperative program between local government and the state for management of shorelines. Under the SMA, local governments have "primary responsibility" for initiating, planning, and administering the regulatory program consistent with the policies of the SMA. The Department of Ecology acts "primarily in a supportive and review capacity with an emphasis on providing assistance to local government and on insuring compliance with the policy and provisions of this chapter." RCW 90.58.050. Under this scheme, Ecology promulgates guidelines for the development of shoreline master programs by local governments. RCW 90.58.060, .100; *see Ass'n of Wash. Bus. v. Wash. Dep't of Ecology*, SHB No. 00-037, 2001 WL 1022097, at *4-9 (Wash. Shorelines Hearings Bd. 2001). Relying on those Guidelines, the local governments must then consider "natural and social sciences; consult with any federal, state, regional, or local agency; consider all previous plans and studies; carry out needed studies; and use all available information and techniques" when developing a shoreline master program. Barron, *supra*, at 4.

In 2003, Ecology formally adopted its Guidelines for approval of new and updated shoreline master programs. Ch. 173-26 WAC (the Guidelines).

In so doing, the department adopted the phrase, "no net loss of shoreline ecological functions," as a guiding principle when considering whether or not to approve local government shoreline regulations. WAC 173-26-186 ("Governing principles of the guidelines"). Consistent with the general understanding of that policy, the Guidelines explain that "no net loss" is a compromise between the needs of the environment and development, specifically stating that "regulations and mitigation standards" must be designed and implemented "in a manner consistent with all relevant constitutional and other legal limitations on the regulation of private property." WAC 173-26-186(8)(b)(i). More, the Guidelines explain that "[t]he concept of 'net' recognizes that any development has potential for actual, short-term or long-term impacts" and that mitigation can "assure that the end result will not diminish the shoreline resources and values as they currently exist." WAC 173-26-201(2)(c).

"No net loss" is a planning strategy that arose from the field of environmental economics, and is intended to provide market solutions to environmental problems. The concept is simple: any unavoidable impacts to ecological function can be offset by new gains, thereby ensuring "no net loss" of overall environmental conditions. In practice, a "no net loss"

standard instructs that new development should avoid and/or mitigate for adverse impacts to on-site ecological functions. This concept, which is focused on protecting existing conditions (whether pristine or already degraded), is markedly different from a strategy that seeks to ensure that ecological gains exceed any losses, which is termed either "net positive impact" or "net gain."

ARGUMENT

I

THE "NO NET LOSS" STRATEGY EXPRESSLY ALLOWS FOR DEVELOPMENT IN ENVIRONMENTALLY SENSITIVE AREAS

The Growth Board clearly erred when it interpreted the SMA and Guidelines as establishing a policy that private property rights are "secondary" to the State's "primary" goal of protecting the environment. Decision at 80. The Board reached that conclusion by cherry-picking pro-environment language from the SMA's statement of purpose, while omitting all pro-property rights language:

> [T]he Board finds that RCW 90.58.020 establishes a state policy to manage shorelines with an emphasis on the maintenance, protection, restoration, and the preservation of "fragile" shoreline "natural resources," "public health," "the

> land and its vegetation and wildlife," "the waters and their aquatic life," "ecology," and "environment."

Decision at 31 (selectively quoting RCW 90.58.020). As a result, the Board upheld shoreline master program provisions outright prohibiting any new development that may impact to the shoreline environment to any degree, regardless of mitigation. *See* JCC 18.25.270(2)(b) ("Uses and developments that cause a net loss of ecological functions and processes shall be prohibited . . . .").

The starting point of statutory interpretation is the plain language and ordinary meaning of the regulation. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). While the SMA does not define the phrase, "no net loss," it does include a statement of the Legislature's intent to strike a compromise between the environment and development rights: "It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses." RCW 90.58.020; *see also Tommy P. v. Board of County Comm'rs of Spokane County*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982) (A plain statement of intent must guide any interpretation of the statute.). Ecology's Guidelines echo the SMA policy of balancing property rights and the environment, explaining that "regulations and mitigation standards" must be designed and implemented "in a manner

consistent with all relevant constitutional and other legal limitations on the regulation of private property." WAC 173-26-186(8)(b)(i).

Indeed, the Legislature readily acknowledged that there will be alterations to the natural environment, which can be avoided, minimized, or mitigated through appropriate planning. RCW 90.58.020. So, too, did Ecology acknowledge that a "no net loss" standard envisions future development of shoreline. WAC 173-26-201(2)(c) (definition of "net"); *see also* Department of Ecology, Shoreline Master Programs Handbook, at Ch. 4-2 (2010) ("[T]he recognition that future development will occur is basic to the no net loss standard. The challenge is in maintaining shoreline ecological functions while allowing appropriate new development, ensuring adequate land for preferred shoreline uses and public access."). Read together, the SMA's statement of policy and the Guideline's definition of "net" protect property rights by encouraging appropriate development, not prohibiting it.

Our courts have repeatedly interpreted the Act to balance environmental interests and property rights through coordinated planning consistent with the express policy of RCW 90.58.020. *See, e.g., Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 697, 169 P.3d 14 (2007) (J.M. Johnson, J., lead opinion); *Biggers*, 162 Wn.2d at 702 (Chambers, J.,

concurring); *Nisqually Delta Ass'n*, 103 Wn.2d at 726; *Futurewise v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d at 243 (J.M. Johnson, J., lead opinion) ("The SMA meant to strike a balance among private ownership, public access, and public protection of the State's shorelines."); *Buechel v. State Dep't of Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994) ("The SMA provides that it is the policy of the State to provide for the management of the shorelines by planning for and fostering all 'reasonable and appropriate uses.); *Overlake Fund v. Shoreline Hearings Board*, 90 Wn. App. 746, 761, 954 P.2d 304 (1998) (The purpose of the SMA "is to allow careful development of shorelines by balancing public access, preservation of shoreline habitat and private property rights through coordinated planning . . . ."); *State, Dep't of Ecology v. City of Spokane Valley*, 167 Wn. App. 952, 963, 275 P.3d 367 (2012) (noting that protecting private property is an express policy of the SMA).

Although the Board cited two intermediate appellate decisions commenting that property interests are "secondary" to the Act's preservation goals,[5] those decisions are inapposite—they do not and cannot alter the plain

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[5] Decision at 30 (citing *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 49, 202 P.3d 334 (2009) (citing *Lund v. Dep't of Ecology*, 93 Wn. App. 329, 336-37, 969 P.2d 1072 (1998))).

language of the SMA as interpreted by the Supreme Court. *See State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (Where the Supreme Court has interpreted a statute, its interpretation is binding on lower courts.). Moreover, the Board failed to note that the cited appellate decisions were referring to the Act's liberal construction clause, which states that the statute is to be "liberally construed to give full effect to the objectives and purposes for which it was enacted." RCW 90.58.900. Neither case concerned the SMA's statement of policy or rights expressly recognized by the Act. RCW 90.58.020, .100. In *Samson*, the court held that, while the SMA recognizes a right to certain priority uses of the shoreline, it does not create rights in unenumerated uses. 149 Wn. App. at 50-51. And in *Lund*, the court rejected the landowner's argument that unauthorized overwater construction fell within the type of single-family residential use allowed by the SMA. 93 Wn. App. at 336-37; *see also Buechel*, 125 Wn.2d at 203 (upholding Ecology's denial of a variance to build on an unbuildable lot); *see also English Bay Enterprises, Ltd. v. Island Cty.*, 89 Wn.2d 16, 18-19, 568 P.2d 783 (1977) (holding that dredge harvesting is a shoreline use subject to the SMA). Insofar as the Board relied on the SMA's liberal construction clause to

extinguish property rights expressly recognized elsewhere in the statute, it committed error.

This is not the first time the Growth Board has misconstrued SMA policy. In *Everett Shorelines Coalition v. City of Everett and Washington State Department of Ecology*, the Growth Board sought to determine whether the SMA constituted "an environmental protection statute, or a 'balancing' statute.'" CPSGMHB Case No. 02-3-0009c, 2003 WL 394132, at *13 (Wash. Central Puget Sd. Growth Mgmt. Hrgs. Bd. 2003). Identical to the decision in this case, the Board selectively quoted pro-environmental language from the Legislatures statement of policy—omitting language protecting development rights—to conclude that "the primary and paramount goal, objective and purpose of the [SMA] is to preserve, protect, enhance, and restore the resources, ecology and ecosystem functions of the shorelines of the state[.]" *Id.* at *16. In so ruling, the Board rejected the argument that the SMA required local government to "balance" property rights. *Id.* Based on the Board's misinterpretation of SMA policy, it concluded that all shorelines must be treated as critical areas and subject to mandatory protections. The Legislature immediately overturned the Board's decision, reaffirming the statement of intent contained in RCW 90.58.020. *See* Engrossed Substitute

House Bill (ESHB) 1933 Laws of 2003, ch. 321 § 1, codified at RCW 90.58.030 and RCW 36.70A.480.

II

THE "NO NET LOSS" STRATEGY REQUIRES AN ACCURATE BASELINE

The Board's erroneous interpretation of "no net loss" advancing a policy that elevates the environment over property rights affected the outcome of the case, and undermines the stated goals of the SMA. Based on that conclusion, the Board interpreted several SMA and Guideline provisions to *not* require that local governments develop an accurate scientific baseline before imposing buffers and other restrictions on shoreline properties. Decision at 44-45, 69-70. Nor, according to the Growth Board, are local governments even required to show that new land use restrictions are necessary or effective. Decision at 19-26, 31, 38-42, 44-45, 49. Thus, the Board upheld the SMP as generally advancing environmental protection goals, by imposing generic buffers and outright prohibiting any new development that may impact shoreline resources.

That conclusion, however, transforms the "no net loss" strategy into a concept so fundamentally defective that it can never achieve the Act's goal of balancing the environment and development. *See* Stacey E. Fawell,

Implementing No Net Loss for Washington State Shoreline Management, at 35 (University of Wash. School of Marine Affairs, 2004). Indeed, the decision is so flawed that, if upheld, the County would not be able to ensure that existing shoreline resources will be protected from new development impacts. *Id.* That is because, for "no net loss" to function, the government must develop an accurate baseline of existing conditions from which to measure gains and losses. *Id.* at 64-65, 69, 75.

Ecology adopted the phrase, "no net loss," to provide both (1) a conceptual goal to guide local governments when developing SMP updates, and (2) an objective standard for structuring permit decisions over the long term.[6] Fawell, *supra*, at 33, 45. To achieve "no net loss" in permitting decisions, it is absolutely essential—both from a practical and theoretical perspective—that the government first determine the actual conditions of the shoreline. WAC 173-26-201(2)(c); Fawell, *supra*, at 33. It is only from such a baseline that gains and losses of ecological function can be measured, and the "appropriateness" of development (including any restrictions and/or conditions) determined. Fawell, *supra*, at 33.

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[6] "No net loss" is intended to provide a meaningful standard for measuring "the ambiguous goal of simply balanc[ing] . . . environmental protection and economic development." Fawell, *supra*, at 44.

A local government's scientific record must, therefore, identify the ecological functions actually present on the shoreline, from which baseline it can determine, in a transparent and consistent manner, the extent of mitigation that may be required. WAC 173-26-201(3)(d)(i)(E); *see also* WAC 173-26-201(3)(d) ("Before establishing specific master program provisions, local governments shall analyze the information gathered ... and as necessary to ensure effective shoreline management provisions, address the topics below, where applicable."). That baseline is necessary because the justification for, and the effectiveness of, mitigation will depend on the existence of a reliable benchmark. *See* Fawell, *supra*, at 33. Indeed, without a baseline, the government cannot determine whether a proposed development will or will not result in a net loss of ecological functions. *Id.* at 64-65, 69, 75. That is to say, without a baseline, local governments cannot achieve "no net loss" without violating property rights by demanding buffers and other mitigation in excess of what is actually required. WAC 173-26-201(2)(e)(ii)(A) (Permit conditions must "not result in required mitigation in excess of that necessary to assure that development will result in no net loss of shoreline ecological functions and not have a significant adverse impact on other shoreline functions fostered by the policy of the act.").

III

THE "NO NET LOSS" STANDARD MUST COMPLY WITH THE CONSTITUTIONAL PRINCIPLES

The Board's interpretation of SMA policy and "no net loss" must be reversed because it violates fundamental principles of takings law, including the doctrine of unconstitutional conditions as set out by *Nollan*, 483 U.S. 825, and *Dolan*, 512 U.S. 374. *See State ex rel. Morgan v. Kinnear*, 80 Wn.2d 400, 402, 494 P.2d 1362 (1972) ("[W]here a statute is susceptible of several interpretations, some of which may render it unconstitutional, the court, without doing violence to the legislative purpose, will adopt a construction which will sustain its constitutionality if at all possible to do so."). The very proposition that property rights are "secondary" to the public's interest in the environment has been flatly refuted by U.S. Supreme Court. *See, e.g., Dolan*, 512 U.S. at 392 (Property rights are not "poor relations" of other rights.).

The fact that the SMP's generic 150-foot buffers are intended to protect environmentally sensitive areas does not mean that the Constitution does not apply. To the contrary, one of the most basic lessons of Takings Clause jurisprudence is that public need, without more, is insufficient to justify a regulation that appropriates property for a public use. *Pennsylvania*

Coal Co. v. Mahon, 260 U.S. 393, 416, 43 S. Ct. 158, 67 L. Ed. 322 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change."). Indeed, all three of the U.S. Supreme Court's exactions cases invalidated development conditions intended to address alleged public needs. In *Nollan*, the California Coastal Commission determined that the public needed access to the beach. *Nollan*, 483 U.S. at 828-29. In *Dolan*, the City of Tigard determined that the public needed storm water buffers on area streams and for additional transportation infrastructure. *Dolan*, 512 U.S. at 378. And in *Koontz*, the Florida legislature determined that developers must provide mitigation in excess of any impacts to designated wetlands. *Koontz v. St. Johns River Water Mgmt. Dist.*, __ U.S. __, 133 S. Ct. 2586, 2592, 186 L. Ed. 2d 697 (2013). None of those cases turned on the legitimacy of the government's need for the land.

The government's right to condition development permits is limited by the nexus and rough proportionality tests of *Nollan* and *Dolan*. Together, those tests hold that the government cannot condition approval of a land-use permit on a requirement that the owner dedicate private property to the public, unless the government can show that the dedication is necessary to

mitigate impacts caused by the proposed development. *Koontz*, 133 S. Ct. at 2594-95. In other words, the Constitution requires that the government establish an accurate baseline from which it can measure development impacts and determine a proportionate measure of mitigation. That burden cannot be satisfied by reference to general area studies, and cannot be shifted onto landowners. *Dolan*, 512 U.S. at 391; *see also Koontz*, 133 S. Ct. at 2604 (Kagan, J., dissenting) (*Nollan* and *Dolan* require "heightened constitutional scrutiny"). The Board's decision to affirm the SMP without holding the County to the baseline requirement set out in the Guidelines violates this constitutional principle and must be reversed.

CONCLUSION

This case presents the Court with a rare opportunity to marry the recommendations of science and environmental policy with the requirements of the Constitution. To be effective and lawful, the "no net loss" strategy must balance property rights with the government's interest in protecting the shoreline environment. For the reasons set out above, the Growth Board's decision to the contrary must be reversed and the matter remanded for compliance with the law and policy of the SMA.

DATED: March 18, 2016.

Respectfully submitted,

BRIAN T. HODGES
ETHAN W. BLEVINS

By _____
BRIAN T. HODGES
(WSBA No. 31976)

Attorneys for Amicus Curiae
Pacific Legal Foundation

No. 47641-0-II

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DECLARATION OF SERVICE BY MAIL

Brian T. Hodges (WSBA No. 31976)
Ethan W. Blevins (WSBA No. 48219)
Pacific Legal Foundation
10940 NE 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-Mail: bth@pacificlegal.org

Attorneys for Amicus Curiae Pacific Legal Foundation

DECLARATION OF SERVICE

I, Brien P. Bartels, declare as follows:

I am a resident of the State of Washington, employed in Bellevue, Washington. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 10940 NE 33rd Place, Suite 210, Bellevue, Washington.

On March ___, 2016, true copies of MOTION OF PACIFIC LEGAL FOUNDATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS, AMICUS BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, and NOTICE OF APPEARANCE were served to the following parties as indicated:

Dennis D. Reynolds 200 Winslow Way West, Suite 380 Bainbridge Island, WA 98110 dennis@ddrlaw.com Counsel for Petitioners OSF, et al.	☒ E-Mail ☒ U.S. First Class ☐ Legal Messenger ☐ Other
Dionne Padilla-Huddleston, AAG Office of the Attorney General of Washington 800 Fifth Avenue, #200 (M/S TB-14) Seattle WA 98104 dionnep@atg.wa.gov Counsel for Respondent Growth Management Hearings Board	☒ E-Mail ☒ U.S. First Class ☐ Legal Messenger ☐ Other

Paul J. Hirsch P.O. Box 771 Manchester WA 98353 pjh@hirschlawoffice.com Counsel for Petitioners CAPR - Jefferson County, et al.	☒ E-Mail ☒ U.S. First Class ☐ Legal Messenger ☐ Other
Duana Kolouskova Vicke E. Orrico 11201 S.E. 8th Street, Suite 120 Bellevue WA 98004 kolouskova@jmmlaw.com; orrico@jmmlaw.com; charlot57TB@jmmlaw.com Counsel for Petitioners Hood Canal Sand & Gravel	☒ E-Mail ☒ U.S. First Class ☐ Legal Messenger ☐ Other
David S. Mann 615 Second Avenue, #560 Seattle WA 98104 mann@gendlermann.com Counsel for Intervenor Hood Canal Coalition	☒ E-Mail ☒ U.S. First Class ☐ Legal Messenger ☐ Other
Sonia A. Wolfman, AAG Office of the Attorney General of Washington - Ecology Div. 2425 Bristol Court SW, 2d Floor Olympia WA 98502 soniaw@atg.wa.gov; ecyolyef@atg.wa.gov; amandab4@atg.wa.gov; deborah.holden@atg.wa.gov Counsel for Respondent State Department of Ecology	☒ E-Mail ☒ U.S. First Class ☐ Legal Messenger ☐ Other

Mark R. Johnsen 701 Fifth Avenue, #3300 Seattle WA 98104 mjohnsen@karrtuttle.com Counsel for Respondent Jefferson County	☒ E-Mail ☒ U.S. First Class ☐ Legal Messenger ☐ Other

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 18th day of March, 2016, at Bellevue, Washington.

BRIEN P. BARTELS